**LEE AH KONG**

**v.**

**ONG & COMPANY**

HIGH COURT MALAYA, KUALA LUMPUR
HARMINDAR SINGH DHALIWAL JC
[CIVIL SUIT NO: S5-22-164-2006]
9 JUNE 2010

***LEGAL PROFESSION:*** *Duty of care - Negligence - Fiduciary obligations - Disputes over legal fees - Solicitors withdrawing application for leave to execute judgment with no liberty to file afresh - Whether client left with no legal recourse to pursue - Withdrawal of application contrary to instructions - Whether constituting breach of good faith and trust - Failure to seek instruction - Effect*

The plaintiff had granted a short-term loan of RM406,150 to one Stesyen Minyak Pak Chat ('SMPC'), after being introduced to the latter by a senior partner of the defendants' legal firm. As security for the loan, a solicitor's undertaking for RM400,000 and a cheque for RM406,150 were issued by SMPC's solicitors and SMPC respectively. It was not disputed that the securities were issued in the name of the defendants, and not the plaintiff. Be that as it may, both the undertaking and the cheques were dishonoured, and in consequence, upon the plaintiff's instruction – the defendants instituted an action against SMPC's solicitors ('Messrs Yusuf Abdul Rahman & Co'), obtained a default judgment against them for RM400,000 and applied for leave to execute the judgment against two of the partners of the firm. The proceedings against Messrs Yusuf Abdul Rahman notwithstanding, no action however was taken against SMPC on the cheque. In the meanwhile, relationships deteriorated as between the plaintiff and the defendants over the legal fees demanded by the defendants, and arising therefrom, the plaintiff, upon forwarding the fees, threatened to sue the defendants, should the defendants for any reason "fail to succeed in the claim against Yusuf Abdul Rahman & Co". Taking umbrage at the threat, the defendants returned the legal fees, and further withdrew the application for leave to enforce the judgment against Messrs Yusuf Abdul Rahman & Co with no liberty to file afresh. The plaintiff alleged that the withdrawal of the application for leave to enforce, and the failure to take any action on the cheque, constituted a breach of fiduciary duty and negligence on the part of the defendants, and

A in the circumstances, instituted the present action against the defendants claiming damages and other relief. The defendants argued that whatever duties owed by them was subject to their contract of retainer and payment of their fees, and averred in any case that action was not taken on the cheque as no instruction B there for was forthcoming from the plaintiff.

**Held (for the plaintiff):**

**(1)** The nature of the securities that were obtained by the plaintiff but in the defendants' name were of the type that was C normally indefensible. Parties who offered such securities would normally pay up or if it proceeds to litigation, they would be hard-pressed to defend and in most cases, barring technical issues, would be ordered to pay up by the court. They were, in short, iron-clad securities almost as good as D cash. (para 25)

**(2)** Quite apart from the common law obligations that normally flow from a solicitor-client relationship, the defendants owed fiduciary obligations with respect to the letter of undertaking E and the cheque. What is decisive in arriving at this conclusion is the fact that the letter of undertaking and the cheque were issued in favour of the defendants and not the plaintiff, the intended beneficiary. The fiduciary obligations that flowed from this relationship were analogous to monies given to a F stakeholder solicitor, who took the same as trustee thereof. Further, there is here the special or inherent vulnerability of the plaintiff to the exercise of power by the defendants. The plaintiff was in a vulnerable position as he was forced to depend on the defendants to act in his interest. G Circumstances therefore existed in this case as to justify the intervention of equity to protect the plaintiff's interest. (paras 23 & 24)

**(3)** By the defendants withdrawing the application for leave to H execute, the plaintiff had lost all recourse against the two partners of Messrs Yusuf Abdul Rahman & Co. The defendants' action was reckless and clearly was in breach of good faith and trust. The defendants were in breach of their fiduciary duty in acting in a manner that totally disregarded I the plaintiff's interest. (paras 28 & 30)

**(4)** While it is true that any fiduciary duty must not be inconsistent with the terms of the contractual relationship between parties, and that a fiduciary relationship will not arise if its imposition alters the true intention of the contract, there was no such inconsistency or alteration of the contract in this case. Although the defendants were unhappy with the comments made by the plaintiff when forwarding the payment, the fees owed were eventually paid prior to the withdrawal of the application. The defendants were thus not justified to react in the manner that they did and it was unreasonable of them to have withdrawn the application after having already received their fees. On the facts, the plaintiff's right to take action against the defendants was always open and the comments he made did not change anything. (paras 27 & 28)

**(5)** The defendants' assertion that no action was taken on the cheque because they received no instruction from the plaintiff was unreasonable. The cheque was issued in their name as payee and they knew the beneficial owner was the plaintiff. Further, as the cheque was given in their name, only they could act against the defaulters in their own name. Hence, it was obligatory of them to seek instruction and not to wait for one and do nothing. The plaintiff has a right to expect that the defendants would act in his best interest. The defendants failed to do that and again there was a breach of fiduciary duty. (para 29)

*[Judgment entered against defendants for RM406,150 together with interest at the rate of 8% per annum from the date of writ until realization. The plaintiff also entitled to costs at RM25,000.]*

**Case(s) referred to:**

*Bristol v. West Building Society v. Mothew [1996] 4 All ER 698* ***(refd)***
*Dato' Seri Au Ba Chi & Anor v. Malayan United Finance Bhd & Anor [1989] 2 CLJ 801; [1989] 1 CLJ (Rep) 460 HC* ***(refd)***
*Galambos v. Perez [2009] 3 SCR 247* ***(refd)***
*Hodgkinson v. Simms [1994] 3 SCR 377* ***(refd)***
*Hospital Products Ltd v. United States Surgical Corporation and Others 55 ALR 417* ***(refd)***
*Lac Minerals Ltd v. International Corona Resources Ltd [1989] 2 SCR 574*
*Nocton v. Lord Ashburton [1914] AC 932* ***(refd)***
*Norberg v. Wynrib [1992] 2 SCR 226* ***(refd)***

**Other source(s) referred to:**

*Jackson & Powell on Professional Liability,* 6th edn, 2007, para 2-130

A *For the plaintiff - Dato' Vijay Kumar Natarajan; M/s Kumar Jaspal Quah & Aishah*
*For the defendants - T Gunaseelan; M/s Gunaseelan & Assocs*

*Reported by Wan Sharif Wan Ahmad*

B

## JUDGMENT

### Harmindar Singh Dhaliwal JC:

C **[1]** The plaintiff's cause of action against the defendants, who are a firm of advocates and solicitors, is for breach of fiduciary duty and/or negligence. The senior partner of the defendants firm had introduced the plaintiff to a third party for the purpose of extending a short-term loan. As collateral for the loan, a solicitor's
D undertaking for the sum of RM400,000 was obtained from the legal firm of Messrs Yusuf Abdul Rahman & Co. and given to the defendants. As further security, a cheque in the sum of RM406,150 was issued in favour of the defendants. Both the undertaking and the cheque were not honoured. The loan was
E never repaid.

**[2]** As both the undertaking and cheque were in the defendants' name, the plaintiff is claiming that the defendants were in breach of its duty by:

F
(i) failing to take any action on the dishonoured cheque; and

(ii) unilaterally withdrawing the application for leave to execute against the partners of the legal firm which had given the letter of undertaking after judgment had been obtained against them.

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**[3]** The defendants are resisting the action by claiming that there was no such breach or negligence and contend that the plaintiff's claim is unsustainable. The broad issue in this case is whether, in the circumstances, there had been a breach of a duty
H of care or breach of fiduciary duty by the defendants.

### The Facts

**[4]** The relevant facts were as follows. A gentleman by the name of Bakri was introduced by a senior partner of the defendants
I firm, Mr Ong Tatt Poh, to the plaintiff who incidentally was also a lawyer and a friend. This Encik Bakri needed a short-term advance of RM400,000 for a company known as Stesyen Minyak Pak Chat pending release of their loan from Pacific Bank.

**[5]** The plaintiff agreed to pay a sum of RM406,150 which sum also included stamping charge for documents amounting to RM6,150. As security, a solicitor's undertaking for a sum of RM400,000 was obtained from Messrs Yusuf Abdul Rahman & Co. who were the solicitors acting for both Pacific Bank and Stesyen Minyak Pak Chat. As additional security, a cheque from Stesyen Minyak Pak Chat for the sum of RM406,150 was also handed over to the defendants. Significantly, the letter of undertaking and the cheque were given in favour or in the name of the defendants.

**[6]** Now with these two securities in hand, the plaintiff would not have anticipated any problems. However, unfortunately for him, it turned out that the cheque was dishonoured when presented for payment. To make matters worse, no payment was forthcoming either from the letter of undertaking.

**[7]** An action was then instituted by the defendant, in their name, against the legal firm of Messrs Yusuf Abdul Rahman & Co. with the plaintiff agreeing to pay the defendants' legal fees. In the said suit D6-22-1070-2000, judgment in default was obtained against the firm of Messrs Yusuf Abdul Rahman & Co. on 11 April 2001 for the sum of RM400,000. As judgment was taken in the name of the firm, the defendant, on 27 October 2003, applied for leave to execute against the partners of the firm. It is unclear why there was a lapse of 30 months before this application was filed. Now the partners of Messrs Yusuf Abdul Rahman & Co were Encik Yusof Abdul Rahman, Encik Khairizan bin Azizi and Encik Munawar bin Hamim. However, Encik Khairizan and Encik Munawar contested the application for leave to execute and also applied to set aside the default judgment.

**[8]** Meanwhile, the relationship between the plaintiff and the defendants deteriorated. It turned out that the plaintiff was slow in paying the fees requested by the defendants. The defendants had sent several letters requesting for payment of the fees. Finally, as the hearing of the application was fixed on 15 April 2004, the defendants sent out a letter dated 12 April 2004 which contained, among other things as it was a long letter, a request to pay the legal fees of RM7,300 by 15 April 2004 failing which there would be certain consequences. These consequences were set out in para. 4 of the said letter as follows:

A 4. Please be informed that should we not hear from you within 48 hours from the date hereof, we shall then take it to deem that we have no instruction from you to proceed with Enclosure 12 and Enclosure 22. In the premise we shall then take the following action, namely:

B (a) We shall withdraw the application for leave to enforce the judgment (Enclosure 12) against En. Khairizan and En. Munawar with no order as to costs. Subject always that they are to withdraw their application to set aside the judgment with no order as to costs.

C (b) Be that as it may should the Solicitor(s) for the above named shall insist that we are to withdraw Enclosure 12 with no liberty to file afresh, we may have to accede to such request as it is not prudent for us to continue with Enclosure 12 whilst we are to bear the costs.

D (c) However we shall nevertheless proceed and obtain order in terms in respect to our application for leave to enforce the judgment against Yusuf Abdul Rahman.

(d) Without prejudice to our right to recover from you the
E outstanding professional charges we may thereafter treat our file as closed.

**[9]** By a letter dated 13 April 2004, the plaintiff replied in the following terms:

F Please be advised that I have never at any time ever complained about your fees, exorbitant or otherwise. My grievance is only the manner is which you demand payment, such demand was always made with the stressful stipulation of date and time together with the threat of your withdrawal of service.

G It is observed that you are not aware of the dual role you have to perform, i.e. as trustee as well as solicitors. Although you have rightly pointed out that I am the beneficiary of the letter of undertaking, of which you are deemed trustee, you are also your own solicitor. The withdrawal of your services renders you liable
H to me as your beneficiary for you will be in breach of your fiduciary duty.

The manner in which you conduct the case on 15th April 2004 depends on the burden this matter rests in your conscience as my trustee.

I Anyhow I have retained solicitors to address you on this matter and no doubt you will hear from them soon.

**[10]** The defendants then write a letter dated 22 April 2004 outlining the background of the letter of undertaking, complaining of the plaintiff's unreasonable conduct with regard to the fees, taking issue with the question of the defendants being regarded as trustees and with the failure of the plaintiff to pay the legal fees. The letter ended by reiterating that if the fees are not paid, then the defendants will proceed to implement the contents of para. 4 of the letter of 12 April 2004 which was reproduced earlier.

**[11]** The plaintiff then, by letter dated 22 June 2004, forwarded a cheque with the same date for the sum of RM7,800. The letter accompanying the cheque was really a short handwritten note which stated:

> The payment attached hereto for your fees is made without prejudice to my right to pursue my claim against you should for any reason whatsoever you fail to succeed in this claim against Yusuf Abdul Rahman & Co.

**[12]** The defendants appeared to take serious objection to the contents of this note to the extent that the said cheque was returned. Their letter of 28 June 2004 was as follows:

> 1. We refer to the contents of your letter dated 22nd day of June 2004 that we received on the 24th day of June 2004 at 4p.m., whereby we maintain that the contents therein are not admitted nor agreeable by us.
>
> 2. In the premise we return herewith your Alliance Bank Malaysia Berhad's cheque no. 326973 dated the 22nd day of June 2004 for your cancellation.
>
> 2.1 We draw your attention to our letters dated 12th day of April 2004 and the 22nd day of April 2004 and herein reiterate the contents therein.
>
> 2.2 Kindly be inform that we had on the 25th day of June 2004 without admission to any liability, withdrew the application for leave to enforce the judgment against Encik Khairizan bin Azizi & Encik Munawar bin Hamim with no liberty to file afresh as so required by the above named individuals and with no order as to costs.
>
> 2.3 Likewise Encik Khairizan bin Azizi & Encik Munawar bin Hamim had on the 25th day of June 2004 respectively withdrew the application to set aside the judgment in default of defence, with no liberty to file afresh and with no order as to costs.

A 2.4 Please find enclose herewith a draft order dated 25th day of June 2004, the contents therein are self-explanatory.

3. In relation to Encik Yusuf Abdul Rahman, the Deputy Registrar has fixed the 09th day of July 2004 for the Hearing of our application for leave to enforce the judgment against Encik
B Yusuf and upon obtaining order in terms we will treat our file as closed.

**[13]** It is significant to note that apart from the return of the cheque, the plaintiff was also informed that the defendants had
C withdrawn the application for leave to enforce the judgment against the two partner of Messr Yusuf Abdul Rahman with no liberty to file afresh. Curiously, the said two partners also withdrew their application to set aside the default judgment with no liberty to file afresh. Effectively, it would appear that the
D plaintiff had lost all recourse against the said two partners. The defendants also appeared to take the position as indicated by their letter of 9 July 2004 that the plaintiff could still sue any other party to reclaim the RM400,000 that was advanced by him.

E **[14]** So much for the facts pertaining to the letter of undertaking, but what about the cheque of RM405,150? Again it is more than a little odd that no action was taken on this cheque. The defendants disputed the fact that they had ever received instructions to pursue recovery on the dishonoured cheque.

F **Breach Of Fiduciary Duty**

**[15]** It is now accepted that a solicitor-client relationship may give rise to obligations concurrently under contract, by virtue of the retainer, under tort by reference to the general duty to exercise
G skill and care, and in equity due to the fiduciary duties a solicitor owes his or her client. The fiduciary principle is, however, an elusive creature. It is hard to pin down what would amount to a fiduciary duty or obligation. It may be easier to define it from the point of view of how it is breached than what it is. A broad
H definition in *Clerk & Lindsell on Torts*,18th edn., suggests that a "breach of fiduciary duty is a civil cause of action for a failure to meet one of the obligations that, in equity, had created a special relationship of fiduciary and principal between the defendant and the claimant respectively, which, if established, would entitle the
I claimant to equitable compensation for his loss or to restitution for the fiduciary's unauthorized gain" (at para 28-01).

**[16]** The Supreme Court of Canada in *Lac Minerals Ltd v. International Corona Resources Ltd* [1989] 2 SCR 574 and *Galambos v. Perez* [2009] 3 SCR 247 recognized that certain categories of relationships are considered to give rise to fiduciary obligations because of their inherent purpose or their presumed factual or legal incidents. These categories are called *per se* fiduciary relationships and the solicitor-client relationship is one example. Their Lordships opined that not every legal claim arising out of a *per se* fiduciary relationship will give rise to a claim for a breach of fiduciary duty. A claim for breach of fiduciary duty may only be founded on breaches of the specific obligations imposed because the relationship is one characterized as fiduciary. Not all lawyers' duty towards their clients are fiduciary in nature. The Supreme Court noted that while the solicitor-client relationship has fiduciary aspects, many of the tasks undertaken in the course of the solicitor-client relationship do not attract a fiduciary obligation. On the same point, their Lordships quoted with approval *Jackson & Powell on Professional Liability* (6th ed. 2007 at para 2-130) where it was said that any breach of any duty by a fiduciary is not necessarily a breach of fiduciary duty. However, it has been held that a failure to perform such obligations will give rise to a remedy in equity regardless of whether the acts complained of also constituted a breach of contract with a right to damages (see *Nocton v. Lord Ashburton* [1914] AC 932 at 956).

**[17]** The nature of the fiduciary duty was discussed by English Court of Appeal in *Bristol v. West Building Society v. Mothew* [1996] 4 All ER 698 where Millet LJ stated as follows (at 711-712):

> This leaves those duties which are special to fiduciaries and which attract those remedies which are peculiar to the equitable jurisdiction and are primarily restitutionary or restorative rather than compensatory. A fiduciary is someone who had undertaken to act for or on behalf of another in a particular matter in circumstances which give rise to a relationship of trust and confidence. The distinguishing obligation of fiduciary is the obligation of loyalty. The principal is entitled to the single-minded loyalty of his fiduciary. This core liability has several facets. A fiduciary must act in good faith; he must not make a profit out of his trust; he must not place himself in a position where his duty and interest may conflict; he may not act for his own benefit or the benefit of a third person without the informed consent of his principal. This is not intended to be an exhaustive list, but it is sufficient to indicate the nature of fiduciary obligations. They are the defining characteristics of the fiduciary. As Dr Finn pointed

A out in his classic work *Fiduciary Obligation* (1977) p 2, he is not subject to fiduciary obligations because he is a fiduciary; it is because he is subject to them that he is a fiduciary.

**[18]** In Australia, in the High Court case of *Hospital Products Ltd v. United States Surgical Corporation and Others* 55 ALR 417, Mason J defined fiduciary relationships as follows (as p. 454):

> The accepted fiduciary relationships are sometimes referred to as relationships of trust and confidence or confidential relations (cf *Phipps v. Boardman* [1997] 2 AC 46 at 127), *viz* trustee and beneficiary, agent and principal, solicitor and client, employee and employer, director and company, and partners. The critical feature of these relationships is that the fiduciary undertakes or agrees to act for or on behalf of or in the interests of another person in a legal or practical sense. The relationship between the parties is therefore one which gives the fiduciary a special opportunity to exercise the power or discretion to the detriment of that other person who is accordingly vulnerable to abuse by the fiduciary of his position.

**[19]** What can be further gained from this case is that a fiduciary obligation will be imported in a case where there is a special vulnerability of those whose interests are entrusted to the power of another to the abuse of that power. But no such fiduciary relationship will be assumed where the arrangement is a commercial one entered into by the parties at arm's length and on an equal footing.

**[20]** With respect to the question of protecting the vulnerable, the Canadian Supreme Court in *Norberg v. Wynrib* [1992] 2 S.C.R. 226, *Hodgkinson v. Simms* [1994] 3 SCR 377 and *Galambos v. Perez, supra*, accepted the concept of a "power-dependency" relationship which concept accurately describes any situation where one party, by statute, agreement, a particular course of conduct, or by unilateral undertaking, gains a position of overriding power or influence over another party (per La Forest J in *Hodgkinson* at 411).

**[21]** In a similar vein, Cromwell J in *Galambos* restated the basic principles of fiduciary law as follows (at 277):

> An important focus of fiduciary law is the protection of one party against the abuse of power of by another in certain types of relationships or in particular circumstances. However, to assert that the protection of the vulnerable is the role of fiduciary law puts the matter too broadly.

**[22]** Cromwell J asserted further that fiduciary law is firstly concerned with the position of the parties that results from the relationship which gives rise to the fiduciary duty than with the respective positions of the parties before they enter into the relationship. Secondly, a critical aspect of a fiduciary relationship is an undertaking of loyalty: the fiduciary undertakes to act in the interests of the other party. Cromwell J also took the view that it was fundamental to the existence of any fiduciary obligation that the fiduciary has a discretionary power to affect the other party's legal or practical interests.

**[23]** In the instant case, after examining the relationship between the parties, and the facts and circumstances that exist, I am of the view that the defendants owed, quite apart from the common law obligations that normally flow from a solicitor-client relationship, fiduciary obligations with respect to the letter of undertaking and the cheque. What is decisive, to my mind, in arriving at this conclusion was the fact that the letter of undertaking and the cheque were issued in favour or in the name of the defendants and not the plaintiff who was the intended beneficiary. I think the fiduciary obligations that flowed from this relationship were analogous to money given to a legal firm as stakeholders. A stakeholder solicitor is regarded as a trustee of those monies (see *Dato' Seri Au Ba Chi & Anor v. Malayan United Finance Bhd & Anor* [1989] 2 CLJ 801; [1989] 1 CLJ (Rep) 460). Although no money has been conveyed yet to the defendants firm, it is significant that only they can institute proceedings to recover the same on the letter of undertaking and the dishonoured cheque.

**[24]** Apart from the element of disloyalty or infidelity on the part of the defendants which flowed from a breach of the solicitor-client relationship, what is noteworthy is the special or inherent vulnerability of the plaintiff to the exercise of power by the defendants to whom the plaintiff has entrusted such power. The plaintiff was in a vulnerable position as he was forced to depend on the defendants to act in his interest. It is axiomatic that the services that lawyers provide may often involve entrustment of property or power to the fiduciary. To deter such professionals from abusing that power vested in them, the law imports fiduciary obligations. I think the circumstances that exist in this case justify the intervention of equity to protect the plaintiff's interest.

**[25]** In coming to this finding, I have also not failed to note the nature of the securities that were obtained by the plaintiff but in the defendants' name. They were of the type that are normally indefensible. Parties who offered such securities would normally pay up or if the matter had to proceed to litigation, they would be hard-pressed to defend and in most cases, barring technical issues, would be ordered to pay up by the court. In other words, they were iron-clad securities almost as good as cash.

**[26]** Were the defendants then in breach of their fiduciary obligations? Now there was no doubt that contrary to the plaintiff's instructions, the defendant proceeded to withdraw the proceedings for leave to execute with the result that there was a judgment against the two partners of the legal firm which issued the letter of undertaking but which judgment you could never enforce against them because it was agreed that there would be no liberty to file afresh any proceedings for leave to execute. In effect, there was no more recourse against the said two partners. By this action of the defendants, there was, in essence, a breach of good faith and trust.

**[27]** In response, the defendants contend that whatever duties owed, whether it be a fiduciary duty or duty of care, it would be subject to their contract of retainer whereby the defendants would only act if their fees were paid. In this regard, I think it is right to suggest that any fiduciary duty must not be inconsistent with the terms of the contractual relationship between the parties. A fiduciary relationship will not arise if its imposition alters the true intention of the contract (see *Hospital Products Ltd v. United States Surgical Corporation and others, supra*).

**[28]** However, in the instant case, I see no such inconsistency or alteration of the contract. The fees owed by the plaintiff were eventually paid prior to the withdrawal of the application although the defendants were unhappy with the comments that were made by the plaintiff when forwarding the payment. I do not think the defendants should have had any cause for complaint in that the payment was not a conditional one. The plaintiff would not have lost his rights to act against the defendants even if he had not put in those comments. The plaintiff's right to take action against the defendants was always open and the comments would not change anything. In other words, they do not matter a jot, either way. The defendants were not justified in reacting in the manner that they did. It was therefore unreasonable for the defendants to

withdraw the application after having already received their fees. I find the contention of the defendants in this regard to be unpersuasive and without merit. To my mind, the defendants were in breach of their fiduciary duty when they acted in such a manner with total disregard to the plaintiff's interest.

**[29]** With regards to the claim on the dishonoured cheque, it is not disputed that no action was taken. The defendants say that they received no instruction to act. Was that reasonable? I do not think so. The cheque was issued in their name as payee. They knew the beneficial owner was the plaintiff. It was obligatory for them to seek instructions and not to wait for instructions. As the cheque was given in their name, only they could act against the defaulters in their own name. They knew this because they had filed an action on the letter of undertaking. It was therefore unreasonable for them to do nothing. The plaintiff had a right to expect that the defendants will act in his best interest. The defendants failed to do that. Again, I think there was a breach of fiduciary duty.

## Breach Of Duty Of Care

**[30]** The plaintiff claims that the defendants owed a duty of care in negligence within the solicitor-client relationship. The plaintiff had engaged the defendants to act in respect of the cheque and the letter of undertaking. They therefore had a duty to exercise reasonable degree of care and skill. By their action to withdraw the application for leave to execute without liberty to file afresh, the plaintiff had lost all recourse against the two partners of Messrs Yusuf Abdul Rahman & Co. This was a reckless action on the part of the defendants no doubt influenced by their displeasure with the plaintiff for failing to pay their fees and for threatening to sue them if they failed to recover the monies that he had advanced. Again, the defendants' response is that there was no obligation for them to act as the plaintiff had not paid their fees. However, as I had already observed, this was not quite the case. The fees were already paid. The defendants were therefore obliged to act but they failed or refused to do so.

**[31]** In respect of the dishonoured cheque, there was, in effect, no action by the defendants. By their letters dated 28 June 2004 and 9 July 2004, the defendants proceeded to return the cheque and closed the file. The same arguments apply in relation to the

A claim in equity. The argument by the defendants that the plaintiff was not without recourse to his claims by other avenues is quite irrelevant to the question of liability. In the circumstances, there was a clear breach of duty of care in respect of both the cheque and the letter of undertaking.

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## Damages

**[32]** As for damages, the defendants were obliged to restore what the plaintiff has lost. The claim on the dishonoured cheque and the letter of undertaking were straight-forward claims with little chance of defeat. There was no evidence to show that he had some other recourse with respect to what he had lost. In the circumstances, the defendants were obliged to pay the plaintiff the sum of RM406,150.

D **[33]** In the result, judgment is entered for the plaintiff against the defendants for the sum of RM406,150 together with interest at the rate of 8% per annum from the date of the writ until realization. The plaintiff is also entitled to costs which, after hearing the parties, I assessed at RM25,000.

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